ALPHONSUS HII HENG TUONG

v.

LOK MIN WAH & 2 ORS.

HIGH COURT SABAH & SARAWAK, KUCHING
DATO' HJ. ABDUL KADIR BIN SULAIMAN J
[SUIT NO. KG. 116 OF 1994(II)]
21 JULY 1995

PRACTICE & PROCEDURE: *Action commenced by writ of summons - Action seeking declarations against company and its directors - Preliminary objection - Whether action should have been begun by petition - Defendants' alleging plaintiff's action in respect of a wrong done to the company - Whether plaintiff has locus standi to bring the action.*

PRACTICE & PROCEDURE: *Plaintiff seeking various declarations, injunction and costs - Defendants' application to strike out pleadings - Order 18 r. 19 RHC 1980 - Whether grounds available - Inherent jurisdiction of Court - Order 92 r. 4 RHC 1980 - Whether applicable.*

The third defendant passed resolutions at an EGM to dispose of certain assets. The plaintiff claimed that he was a director of the third defendant and alleged that he was not given notice of the board meetings which passed the resolutions. The plaintiff therefore brought an action against the other directors seeking to restrain the company from disposing of the assets.

The defendants claimed that the plaintiff had retired as a director of the company and was therefore not entitled to receive any notice. The defendants sought to strike out the plaintiff's claim and raised preliminary objections as to the mode of commencement of the action and as to the plaintiffs *locus standi* to sue.

Held:

[1] Considering the pleadings as a whole and the plaintiff's complaints, the plaintiff has adopted the proper procedure in instituting the action by way of writ of summons for declarations and injunction and he is the proper plaintiff in the action. It does not follow that because he is a minority shareholder he must institute the action by way of a petition under O. 88 r. 5 of the RHC 1980. A declaration can be resorted to to determine the rights of parties or to determine a point of law. As there is no defence filed by the defendants, the Court has to assume that the pleadings contained in the plaintiff's statement of claim is true.

[2] Judging from the various affidavits filed, there appears to be serious conflicts in the evidence both for and against the plaintiff. These conflicts can be resolved only at the full trial of the action by the oral evidence of all parties. In that sense the plaintiff's claim cannot be said to fall under any of the grounds under O. 18 r. 19 or under O. 92 r. 4 of the RHC 1980 which entitles the defendants to the prayers sought in this application.

[3] Even assuming that the purported EGM to accept the plaintiff's resignation was held, the informal meeting had between the plaintiff and the defendants, which is oral in nature, could not be the basis for a valid resignation of the plaintiff as a director since under article 74 of the articles of association of the company the only valid resignation of the office of a director of the company is by the director tendering a notice in writing to the company. In the circumstances the defendants have not shown that they could succeed under any of the grounds laid down under O. 18 r. 19 RHC 1980 or under the inherent jurisdiction of the Court.

[Defendants' application dismissed with costs. Defendants ordered to file defence within 14 days].

Cases referred to:
Foss v. Harbottle ***(refd)***
Burland v. Earle, [1902] AC 83 ***(refd)***
Guaranty Trust Co. of New York v. Hanny [1915] 2 KB 536 CA ***(refd)***
Kerr v. John Mottram Ltd [1940] All ER 629 ***(cit)***
Daniels & Ors. v. Daniels & Ors. [I978] 2 WLR 73 ***(dist)***
Pavlides v. Jensen [1956] Ch. 565 ***(dist)***

Legislation referred to:
Companies Act 1965, ss. 139A, 156
Rules of the High Court 1980, O. 15 r. 16, O. 18 r. 19(1)(a), (b), (c), (d), O. 88 r. 5(h), O. 92 r. 4

Other sources referred to:
Mallal's Supreme Court Practice, 2nd Edn., p. 143

For the plaintiff - Albert Tang, M/s. Chew, Jugah, Wan Ullok & Co.
For the defendant - Chong Siew Chiang, M/s. Chong Brothers

JUDGMENT

Hj. Abdul Kadir bin Sulaiman J:

This is the judgment in respect of the application of the defendants under O. 18 r. 19(1) of the Rules of the High Court 1980 (hereinafter referred to as "the RHC") and under the inherent jurisdiction of the Court which is O. 92 r. 4 of the RHC. Further grounds are as contained in the affidavit in support of the defendants which avers that the plaintiff has commenced the action by a wrong procedure and that the plaintiff has no *locus standi* to institute this action against the defendants. It is the contention of the defendants that the action ought to have been commenced by a petition instead of by way of a writ of summons and that as the action of the plaintiff is in respect of a wrong done to the company, the proper plaintiff ought to be the company and in the circumstances, the plaintiff has no *locus standi* to pursue the action against the defendants.

So, before I deal with the merit of O. 18 r. 19 and O. 92 r. 4 of the RHC, I would like first to dispose off the objection of the defendants mentioned above on the basis of adopting a wrong procedure to institute the action and the *locus standi* of the plaintiff. The plaintiff commenced this action by writ of summons praying for various declarations and injunction and costs. The defendants say that it ought to have been commenced by petition pursuant to O. 88 r. 5(h) of the RHC as it concerns the wrong done to the company which is the third defendant and not to the plaintiff.

According to the plaintiff's re-amended statement of claim it is averred that he, the 1st and 2nd defendants are shareholders and directors of the 3rd defendant company since its incorporation on 20 May 1982. On or about 26 October 1994 he was served with a notice of extraordinary general meeting of the company to be held on 29 November 1994. It was issued by one Sim Boon Chuan purportedly the secretary of the company to be pursuant to an order of the board of directors made at the board's meeting on 24 October 1994. The plaintiff being a director has, however, not been served or given notice of the purported board's meeting deciding on the holding of the said extraordinary general meeting. As such he avers that any resolutions or decisions or order made at the said board meeting and for that matter any or all of the purported board's meeting in which no proper notice was given to him are unlawful null and void. He further avers that he was unaware of the appointment of the said secretary as he has never been served or given notice nor was he present at the board's meeting which passed the resolution or made the decision to appoint the said secretary of the company. Thus, he contends that the purported appointment of the

said secretary is unlawful null and void as well. It follows therefore, that the said secretary had no power or authority to convene the said extraordinary general meeting scheduled to be held on 29 November 1994 or to issue the said notice of the meeting. By a letter to the defendants dated 28 November 1994 he protested over the propriety of the said intended extraordinary general meeting proposed to be held on 29 November 1994. His averment goes on to say that despite the said letter of protest, the defendants proceeded with the said extraordinary general meeting on the appointed date and passed the resolutions to sell the company's shophouse for RM450,000 and the company's motor vehicle No. KT 698 to the 1st defendant for RM50,000 and the defendants now threaten to implement the aforesaid resolution unless restrained by the Court. He further avers that if the company's assets are dealt with, it will cause irreparable damage to his rights and interests and will also cause inconvenience to third parties. On 7 December 1994 he made a search at the Registry of Companies and discovered that the 2nd defendant had submitted a Form 49 dated 7 January 1994 purportedly to state that he had retired as a director on 31 December 1993, to which he denied. He lastly avers that he was not given any notice of annual general meeting that was purportedly convened on 31 December 1993 and that he never retired as a director as alleged. Upon the above averments, he claims against the defendants for:

a) a declaration that the board of directors' meeting of the 3rd defendant company held on 24 October 1994 and all other purported board of directors' meeting in which no proper notice was given to him, and all proceedings therein are unlawful and any or all resolutions or any order passed or any decision made therein is or are unlawful null and void.

b) a declaration that the extraordinary general meeting of the 3rd defendant held on 29 November 1994 is improperly convened, unlawful null and void.

c) an injunction restraining the 3rd defendant by itself, its servants, agents or otherwise howsoever from selling or disposing or in any way dealing with the 2 aforesaid items of property of the company, or in any way implementing any resolutions passed at the purported extraordinary general meeting of the company held on 29 November 1994 until the final determination, disposal or conclusion of this action or until further orders.

d) a declaration that he never retired as a director on 31 December 1993 and that the purported annual general meeting on 31 December 1993 or any other annual general meeting in which no proper notice was given to him was invalid null and void.

e) costs and any other reliefs this Court deems fit and just.

Thus, looking at the pleadings of the plaintiff, his grievance is that firstly, he never retired as a director of the 3rd defendant company as contained in Form 49 dated 7 January 1994 filed with the Registrar of Companies. If he is right, then clearly it is not a wrong done to the company as contended by the defendants. It is a wrong done to him personally of having been thrown out of the directorship of the company without proper authority. This act if proved, amounts to an act which is illegal or *ultra vires* the company, and which a majority are consequently unable to affirm. In such circumstances, a single shareholder, like the plaintiff, can sue alone in his personal capacity and may restrain the company and the other directors from doing such act to him. It is not a matter of internal management of the company done within its powers, with which, on the principle stated in *Foss v. Harbottle* the Court normally will not interfere. It is an exception to that principle. In *Burland v. Earle*, [1902] AC 83, Lord Davey in the Privy Council at page 93 says:

> It is an elementary principle of the law relating to joint stock companies that the Court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so.

If the defendants contend otherwise, the matter becomes a triable issue at the full trial of the action. Therefore, it is not proper at this stage of the proceedings for the Court to have the pleadings struck out on the ground that the plaintiff has no *locus standi* to sue.

Secondly, the plaintiff is alleging that he was unaware of the board of directors' meeting held on 24 October 1994 authorising the extraordinary general meeting scheduled to be held on 29 November 1994. If he is again right in saying that he never ceased to be a director of the 3rd defendant company at the material time, he ought to have been informed of the said board of directors' meeting which he alleged that he has not been served or given notice of the purported board's meeting deciding on the said extraordinary general meeting. This clearly is again an allegation of wrong done to him personally. If he remains a director, he ought to have been served or given notice of the purported board's meeting. Thirdly, he challenges the appointment of Sim Boon Chuan as the secretary of the company, as according to him the appointment is to be based on the resolution of the directors at a board meeting which he was unaware of. This issue, though in connection with a wrong done to the company but it is related to his expulsion as a director of the company resulting in him not being notified of the board meeting deciding on the appointment of the secretary. Fourthly, it also relates to his alleged expulsion from the board, and he challenges the decision of the company to hold the extraordinary general meeting of 29 November 1994 on account of his absence from the board's meeting resolving to hold such extraordinary general meeting. Fifthly, he challenges the decision arrived at the said extraordinary general meeting disposing off the company's properties for the lack of proper authority to do so it being not properly convened on account of his absence from the board meeting. Since, it was decided at the said impugned extraordinary meeting as to the disposal of the company's properties, he seeks an injunction to stop the implementation of the decision so made. So, considering the pleadings as a whole, I am satisfied that the plaintiff has adopted a proper procedure in instituting the action by way of a writ of summons for declarations and injunction and that he is the proper plaintiff in the action. It does not follow that because he is a minority shareholder he must institute the action by way of a petition under O. 88 r. 5 of the RHC only. The jurisdiction of the Court to make a declaration under O. 15 r. 16 of the RHC is not confined to cases in which the plaintiff has a complete and subsisting cause of action apart from the rule, or, in which the plaintiff also seeks relief apart from the declaration: *Guaranty Trust Co. of New York v. Hanny* [1915] 2 KB 536 CA. A declaration can be resorted to ascertain and determine the rights of parties or to determine a point of law: see *Mallal's Supreme Court Practice,* 2nd Ed., at page 143. At this stage of the proceedings there is no defence as yet filed by the defendant. In the circumstances, the Court has to assume that the pleadings contained in the plaintiff's statement of claim is true.

Having disposed of the issue of the procedure to institute the action and the *locus standi* of the plaintiff, I will now deal with the merits of the application of the defendants for the striking out of the pleadings of the plaintiff.

For an application under O. 18 r. 19 on ground (1)(a) no evidence except the impugned pleadings is to be considered by the Court. In this case the plaintiff's statement of claim. The learned Counsel for the defendants submitted that the pleadings are defective particularly prayer (b) of the statement of claim praying for a declaration that the extraordinary general meeting of the 3rd defendant company held on 29 November 1994 was improperly convened, unlawful, null and void. This allegation of the plaintiff is on the basis that he was not

involved in the board of director's meeting making the decision to hold such extraordinary general meeting. The reason for his absence was because he was treated by the defendants as having resigned from the directorship on 31 December 1993, which he denies as so averred in his statement of claim. The plaintiff also disputes the authority of Sim Boon Chuan, the purported secretary of the company issuing the said notice of the extraordinary meeting when he was not involved in the appointment of the said secretary for the reason that he was not made aware of the board meeting agreeing to such appointment. If the plaintiff was right in saying that he did not resign as a director, then he ought to have been served or given the notices for the holding of such of the director's meetings. The learned Counsel for the defendants argues that the appointment of the secretary was properly minuted and had been officially and properly submitted to the Registrar of Companies. He cited s. 156 of the Companies Act 1965 and the case of *Kerr v. John Mottram Ltd.* [1940] All ER 629 as authority for saying that the minute is conclusive unless set aside upon allegation of fraud. I agree that it should be so, provided that there was a proper meeting held. In this case the plaintiff is challenging on the impropriety of the various meetings held during his absence on account of him being treated by the defendants as having resigned from his directorship of the company, to which he denies. No doubt in the pleadings the plaintiff does not directly pray for the appointment of the secretary to be declared null and void and he was not made a party to the action, but the central issue is that the plaintiff claims that he never retired on 31 December 1993 as a director as contended by the defendants and as such he is entitled to participate in the management of the company, including the decision to appoint a secretary of the company. The learned Counsel also cited two other authorities i.e. *Daniels & Ors. v. Daniels & Ors.* [I978] 2 WLR 73 and *Pavlides v. Jensen* [1956] Ch. 565 in support of his contention. In my view these two authorities are of no relevance at all because the actions there were minority shareholders' action against the directors, but this action of the plaintiff is not of the kind. In the circumstances, I see no merit at all in the contention of the defendants and on the face of the statement of claim of the plaintiff, the defendants have failed to establish that the statement of claim of the plaintiff discloses no reasonable cause of action under ground (a) of O. 18 r. 19 (1)(a) of the RHC.

On grounds (1)(b) to (d) of O. 18 r. 19 and under the inherent jurisdiction of the Court, evidence by affidavits is admissible to determine whether the pleadings ought to be struck out. This application of the defendants is supported by the affidavit of Lok Min Wah, the first defendant, affirmed on 20 December 1994. He avers that he is the manager, assistant secretary as well as director of the 3rd defendant holding 20,000 shares as against the plaintiff's 15,000 shares. The other shareholders are the 2nd defendant holding 15,000 shares and one Hii Yeu King, the son of the plaintiff, the balance of 15,000 shares.

The first defendant further deposed that **before 31 December 1993**, in an informal meeting of the 3rd defendant company, the plaintiff indicated to him in the presence of the 2nd defendant, his mother, that the plaintiff would like to retire as a director and resign as manager of the company on the ground that he did not take active part in the management of the business of the company. This verbal retirement as manager and director of the plaintiff was accepted at **the annual general meeting of the company held on 31 December 1993** wherein the 1st and 2nd defendants and one Hii Yeu Kiong, the other shareholder, were reelected as directors of the company for the ensuing year and the 1st defendant was appointed manager and assistant secretary of the company. Exhibit "LMW2" is a copy of the minutes of the said annual general meeting.

On 6 May 1994 a board of director's meeting was held and attended by the 1st and 2nd defendant and the said Hii Yeu Kiong. It was resolved, *inter alia*, that the aforesaid Sim

Boon Chuan be appointed the secretary of the company with effect from 7 May 1994. The said meeting was held pursuant to a notice dated 3 May 1994 a copy of which is exhibited as "LMW3B". A copy of the said resolution passed and the attendance list are exhibited as "LMW3" and "LMW3A".

On 24 October 1994 another board of director's meeting of the company was held and attended by the 1st and 2nd defendants and the said Hii Yeu Kiong. At the meeting it was resolved that:

(i) the shophouse described as Lot 2119 Block 4 Miri Concession Land District owned by the 3rd defendant be sold for RM450,000; and

(ii) the car bearing registration plate No. KT 698 be disposed of to the 1st defendant at RM50,000 for setting off the debt due to her.

In the said meeting, the 2nd defendant proposed that an extraordinary general meeting of the company be held on 29 November 1994 for shareholders to consider and if think fit, approve both the aforesaid resolutions of the board and the said proposal was seconded by the deponent without any objection from Hii Yeu Kiong. A copy of the minutes of the said directors' meeting is exhibited as "LMW4".

On 24 October 1994 a notice of an extraordinary general meeting scheduled to be held on 29 November 1994 was sent out to all the shareholders of the company. The said extraordinary general meeting was held as scheduled and it was resolved that the company's shophouse be sold to one Ong Hua Kuo for RM450,000 and that the motorcar be disposed off to the 1st defendant for RM50,000 to set off the account due to her. A copy of the minutes of the said extraordinary general meeting is exhibited as "LMW6". It is also averred that the object of the sale of the said land is with a view to reduce the heavy indebtedness and financial burden of the company.

On 28 December 1994 the defendants filed another affidavit through the 2nd defendant affirmed on the same date. In the main the affidavit repeats the aforesaid affidavit of the 1st defendant except as to the averment that prior to the appointment of Sim Boon Chuan as the secretary on 6 May 1994, Hii Yeu Kiong acted as a secretary in contravention of s. 139A of the Companies Act 1965 and was compounded by the Registrar of Companies on l3 September 1994 for the contravention. Hence the appointment of Sim Boon Chuan to replace him. The said affidavit further deposes that *the plaintiff is not entitled to a notice of any board of director's meeting since the date of his ceasure to be the director effective on 1 January 1994 pursuant to the acceptance by the annual general meeting of 31 December 1993 of his verbal retirement as such and the resignation as the manager of the company.*

In the plaintiff 's affidavit affirmed on 16 January 1995 he denied having indicated at any informal meeting to the 1st and 2nd defendants that he intended to retire as a director of the company. He averred that the allegation is a fabrication in order to justify their holding out to the Registrar of Companies that he had retired as such on 31 December 1993 by filing the Form 49 lodged by the 1st defendant on 7 January 1994 with the Registrar. To support his contention he exhibited as "AH9 " an affidavit of the 2nd defendant affirmed on 11 April 1994 in Originating Summons No. KG 65 of 1994/11 between the defendants and Michael Hii Yeu Kiong as plaintiff wherein at paragraph 4 it was deposed by the 2nd defendant thus:

> 4. During an informal meeting held on **13 January 1993** at about 8.00 p.m., the deponent Hii Heng Tuong (the plaintiff in this present proceedings) made known to me that the reason why he did not attend the Extraordinary General Meeting held on **22 December 1993** was

a because he wanted to resign as he said that he was never been involved in the active management of the 3rd defendant company in the 1st place. (the emphasis is mine).

Also in respect of the same proceedings, the son of the 2nd defendant and who is also the brother of the 1st defendant by the name of Lok How Heong affirmed an affidavit on the same date, (exhibit "AH10"), and at paragraphs 3 and 4 the deponent deposed thus:

b 3. During an informal meeting held on **13 January 1993** at about 8.00 p.m. at the office of the 3rd defendant company, I was invited by the chairman of the board of directors of the 3rd defendant company to have an informal discussion pertaining to the further running of the 3rd defendant company which had financing facilities secured against properties of my mother, the chairman of the board of directors.

c 4. The said deponent Hii Heng Tuong (the present plaintiff in the presence of the chairman of the board of directors and in my presence indicated in unequivocal terms that he did not seek re-election as the director of the 3rd defendant company as he was never actively involved in the 3rd defendant company's activities in the first place." (the emphasis is mine).

The plaintiff avers that as the purported informal meeting took place **before** the general meeting on 31 December 1993, the depositions in the two said affidavits cannot be true. Firstly, the 2nd defendant was referring to an extraordinary general meeting held on **22 December 1993** d and not in respect of 31 December 1993. Secondly, the informal meeting could not have taken place before the stated extraordinary general meeting giving reason for the plaintiff's absence at the said general meeting. As to the annual general meeting of 31 December 1993, he as a shareholder did not receive any notice calling for same. He was also not given any notice to attend any board of directors' meeting in which it was resolved by the directors to call for the purported annual general meeting on 31 December 1993. He exhibited "AH11" being e minutes of the annual general meeting held on **22 December 1993** wherein it was resolved that the resignation of the plaintiff as manager of the company be accepted. Be it noted that in her affidavit of 28 December 1994 dealt with above, the 2nd defendant exhibited "KM1" which purports to be minutes of the said annual general meeting held on **31 December 1993**. This "KM1" of the defendants is identical to "AH11" of the plaintiff except for the date of the holding of the said annual general meeting. According to the exhibit of the plaintiff the f said meeting was held on 22 December 1993 whereas the exhibit of the 2nd defendant gives the date as 31 December 1993. Item 8 in both the exhibits deals with the acceptance of the resignation of the manager of the company, i.e. the plaintiff. Thus according to the plaintiff, as deposed in his affidavit, there was no such annual general meeting held on 31 December 1993. The plaintiff got this copy of exhibit "AH11" from his son, Hii Yeu Keong (the plaintiff in Originating Summons No. KG 65 of 1994/II mentioned earlier) who is one of the g shareholders of the company. Both the copies of the exhibits were signed by the manager of the company by affixing the stamp of the company against the signature. The plaintiff denied ever tendering any **notice in writing to** retire as a director as required by the articles of association of the company. Thus he maintains that he is still the director of the company.

On 23 January 1995 the second defendant affirmed another affidavit in response to the affidavit of the plaintiff of 16 January 1995 mentioned above. In an attempt to clear the doubt h as regard the allegation of the oral communication by the plaintiff of his desire to resign, the 2nd defendant avers that this oral communication was given by the plaintiff to her and the 1st defendant on more than one occasion before the annual general meeting of 31 December 1993. She further alleges that the plaintiff even confirmed to her as to the correctness of his retirement as a director even shortly after the said annual general meeting. As to the date of the annual general meeting she maintains it to be on 31 December 1993 and "AH11" was i merely a draft and the date of the meeting purportedly to be on 22 December 1993 was wrongly inserted.

To this affidavit of the 2nd defendant, the plaintiff affirmed yet another affidavit on 27 January 1995. In support of his contention that "AH11" is not a draft he tendered another document exhibited as "AH13" which is the attendance list of the purported annual general meeting of **22 December 1993** duly signed by the 1st and 2nd defendant leaving out the name of Hii Yeu Keong unsigned. This "AH13" is identical to the attendance list exhibited by the 2nd defendant attached to exhibit "KM1" except for the date of the meeting and against the name of Hii Yeu Keong it is recorded as "absent". The plaintiff maintains that the two purported annual general meetings were fictitious and he was never given any opportunity and proper notice to attend a real annual general meeting which he claims was never held. He pointed out that in neither of the two attendance lists his name appears even as a shareholder of the company. Thus judging from the various affidavits filed there appears to be serious conflicts in the evidence both for and against the plaintiff. These conflicts can be resolved only at the full trial of the action by the oral evidence of all parties. In that sense the claim of the plaintiff cannot be said to fall under any of the grounds under O. 18 r. 19 or under O. 92 r. 4 of the RHC which entitles the defendants to the prayer sought in this application. Even assuming that the purported extraordinary general meeting was held, the informal meeting had between the plaintiff and the defendants before 31 December 1993 which is oral in nature could not be the basis for a valid resignation of the plaintiff as a director for under article 74 of the articles of association of the company (exhibit "AH5" to the second affidavit of the plaintiff) the only valid resignation of the office of a director of the company is by the director tendering a notice in writing to the company. In this case of the plaintiff as admitted by the defendants, the notice if any, was only oral. Therefore, in all the circumstances of the case the application of the defendants is dismissed as it has not shown that it could succeed under any of the grounds laid down under O. 18 r. 19 of the RHC or under the inherent jurisdiction of the Court. The application is dismissed with costs to the plaintiff. The defendants are hereby ordered to file their defence, if any, within 14 days.